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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of RAYMOND MICHAEL PEDERSEN and HEIDI PEDERSEN.	
RAYMOND MICHAEL PEDERSEN, Respondent, v. HEIDI KAPPELER, Appellant.	D053876 (Super. Ct. No. EFL06400)

APPEAL from an order of the Superior Court of Imperial County, Poli Flores, Jr., Commissioner. Reversed and remanded with directions.

Heidi Kappeler appeals a family court order denying her request that the stipulated child custody and visitation orders incorporated into the judgment dissolving her marriage to Raymond Michael Pedersen be modified so as to give her sole legal and physical custody of their child. Kappeler contends the court erroneously applied the

significant change of circumstances standard, rather than the best interests of the child standard, when it evaluated her request for a change in custody, because she and Pedersen did not intend that the orders be permanent or final.

The issue we must decide is whether the court erred in finding that the stipulated custody provisions set forth in the judgment constituted a final judicial custody determination within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*) such that the court should have applied the best interests of the child standard, rather than the substantial change of circumstances standard. We conclude the court erred in finding that the stipulated custody provisions were a final judicial custody determination within the meaning of *Montenegro*, and thus it erroneously applied the substantial change of circumstances standard. Accordingly, we reverse the order denying Kappeler's request for change of custody and remand the matter with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Kappeler and Pedersen were married in 2004. Their only child, Caitlynn, was born in 2005. The parents separated in March 2007.

In January 2008 the court entered a judgment of dissolution on reserved issues. Incorporated into the judgment was a marital termination agreement (agreement), which the parties executed following private mediation.[1] In section 6.01 of article 6 of the agreement, the parties stipulated to the following provisions pertaining to child custody and visitation:

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1 The parties met first with Shari Delisle, Marriage and Family Therapist (MFT), and then with Penny Angel-Levy, MFT.

> "Section 6.01. Subject to the further order of any court of competent jurisdiction, Husband and Wife agree to the following:
>
> "1. The parents shall continue to share joint legal custody of the child. They understand this to mean that they share information and decision making regarding the non-emergency health, education and welfare of the child.
>
> "2. The parents will continue to follow their 2-2-3-3 schedule as they have been. . . ."
>
> "3. *The parents will review the custodial schedule when the child is older and the 2-2-3-3 schedule is no longer optimal for her*." (Italics added.)

Neither the form judgment, nor the agreement incorporated therein, mentioned mediation or any reports or correspondence by the mediators.

In June 2008 Kappeler filed an order to show cause (OSC) requesting (among other things) that the child custody and visitation orders be modified so as to give her sole legal and physical custody of the child. In support of her OSC, Kappeler submitted the declaration of Lupe Patron, who stated she cared for children professionally for over 20 years and had served as Caitlynn's daily care provider since her birth. Patron stated that Caitlynn had been a happy child, but she became emotionally needy and cried more often after her parents implemented the 2-2-3-3 parenting plan. Patron expressed concern for Caitlynn's welfare and stated her belief that Caitlynn needed to be primarily in her mother's care because she seemed to have a closer bond with her mother. Asking the court to "grant [Kappeler] primary residence with reasonable visitation to [Pedersen]," Patron stated her opinion that "[w]hen [Caitlynn] is older the current arrangement may be appropriate but for now Caitlynn is at risk."

Pedersen filed a responsive declaration, requesting that child custody "[r]emain as is or custody to me" and stating that there had been "no material change of circumstance." To his declaration, Pedersen attached a copy of a September 2007 letter to the parties' attorneys from mediator Angel-Levy setting forth the terms of the parties' marital termination agreement (discussed, *ante*) and stating that Kappeler and Pedersen "were both very cooperative with the process and put forth sincere effort in mediation."

Pedersen also attached to his declaration a copy of an October 2007 addendum letter to the parties' attorneys from Angel-Levy, who informed counsel that when she wrote the first letter (discussed, *ante*), she was "unaware that the contents of that letter did not represent an agreement of the parents until the mother telephoned me last week to indicate that she was not in agreement and planned to litigate the issue of custodial schedule for the child." Angel-Levy indicated that Kappeler acknowledged Pedersen was a "good parent", Caitlynn had been following a "2-2-3 schedule for months", Kappeler told Angel-Levy that "'flip-flopping [was] confusing for the child" and that Caitlynn had been "throw[ing] above average temper tantrums", and Pedersen indicated he believed the 2-2-3 schedule was working well and denied the concerns raised by Kappeler regarding Caitlynn's reactions to the schedule. Angel-Levy also indicated in the letter that there were "some inconsistencies in [Kappeler's] position" and that Kappeler was unable to articulate in specific terms why she thought the schedule was confusing or what she meant by "above average temper tantrums." Angel-Levy stated that during the second mediation conference with the parents, it was her "understanding (evidently in error) that [Kappeler] agreed to maintain the current custodial schedule until the child is

older at which time modification would be considered." She also stated that "[f]or the present, the schedule is somewhat workable"; *"*[*b*]*oth parents did agree that a 2-2-3 schedule is not suitable for a longer term parenting plan"*; and "*if* [*Kappeler*] *continues to be of the belief that a primary home must be chosen for the child, a full custody evaluation would be required* because both parents would need to be considered as potential primary custodians." (Italics added.) Angel-Levy concluded that "[t]here is simply not enough clear information at this time to formulate any recommendations for changing the custodial schedule."

At the August 2008 hearing on Kappeler's OSC, Kappeler's counsel acknowledged that the parties had entered into an agreement in January, based on mediation conducted by "very qualified" Angel-Levy, to "share the joint physical custody of the child on a two-two, three-three visitation schedule" and that judgment was entered in accordance with the agreement. Counsel stated it was Kappeler's understanding that the custody order "would be an order that would require the parties to observe how [Caitlynn] reacted to this new schedule," and "it was not the intent of the parties" that the stipulated order "be a *Montenegro* order requiring a change of circumstances."

Pedersen's counsel argued that the judgment was a "final judgment," and the parties intended that it be a "final order." He acknowledged that Angel-Levy never did a full evaluation because "the parties chose to agree at that point to retain this arrangement which then became final." Furthermore, counsel argued, there were no changed circumstances.

The court denied Kappeler's request for modification of the stipulated child custody and visitation orders, finding the judgment was a final judgment, and there was no change in circumstances that would warrant any change in the judgment with regard to visitation or custody. Kappeler's appeal followed.

STANDARD OF REVIEW

As this appeal involves a dispute concerning the legal effect of a judgment, we review the court's order on Kappeler's OSC under the following standard of review:

> " 'The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally. [Citations.] " '[T]he entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention.' " [Citation.] " 'No particular part or clause in the judgment is to be seized upon and given the power to destroy the remainder if such effect can be avoided.' " [Citation.] [¶] Where an ambiguity exists, the court may examine the entire record to determine the judgment's scope and effect. [Citations.] The court may also " 'refer to the circumstances surrounding the making of the order or judgment, [and] to the condition of the cause in which it was entered.' " [Citations.] Subsequent actions by the re[n]dering judge may be considered as bearing upon the judgment's intended meaning and effect. [Citation.]' [Citation.]" (*In re marriage of Richardson* (2002) 102 Cal.App.4th 941, 948-949.)

DISCUSSION

Kappeler claims that she and Pedersen did not intend the stipulated legal and physical child custody orders to be a final judicial custody determination within the meaning of *Montenegro, supra*, 26 Cal.4th 249, and thus the court should have applied the best interests of the child standard. We conclude the record supports Kappeler's claim.

A. *Applicable Legal Principles*

In the absence of a final judicial custody determination, "[t]he court and the family have 'the widest discretion to choose a parenting plan that is in the *best interest*[*s*] *of the child*.' [Citation.]" (*Montenegro, supra,* 26 Cal.4th at p. 255, italics added, fn. omitted.) If, however, there has been a final judicial custody determination, the parent "seeking to alter the order for legal and physical custody can do so only on a showing that there has been a *substantial change of circumstances* so affecting the minor child that modification is essential to the child's welfare." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 37, italics added; *Montenegro,* at p. 256.) This judicially created rule "fosters the dual goals of judicial economy and protecting stable custody arrangements." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535; *Montenegro,* at p. 256.)

The changed circumstances rule or standard applies whenever final custody has been judicially determined, regardless of whether the initial custody determination resulted from the parents' agreement, a default judgment, or litigation. (*Montenegro, supra,* 26 Cal.4th at pp. 256-257.) The California Supreme Court has explained that although stipulated custody orders may be final judicial custody determinations for purposes of the changed circumstances rule, "many stipulated custody orders are not intended to be final judgments. Child custody proceedings usually involve fluid factual circumstances, which often result in disputes that must be resolved before any final resolution can be reached. Although the parties typically resolve these disputes through stipulations confirmed by court order, they often do not intend for these stipulations to be permanent custody orders." (*Montenegro,* at p. 258.) The *Montenegro* court further

explained that because "temporary custody orders serve an important role in child custody proceedings," courts must be careful to construe these orders so as not to discourage parties from entering into stipulations. (*Ibid*.) Accordingly, stipulated custody orders are final judicial custody determinations "for purposes of the changed circumstance[s] rule only if there is a *clear, affirmative indication the parties intended such a result*." (*Ibid*., italics added.) This requirement "ensures that courts effectuate the *actual* intent of the parties when they entered into the stipulation without precluding them from making enforceable promises [citation]." (*Ibid*.)

B. *Analysis*

Here, there is no clear, affirmative indication that Kappeler and Pedersen intended that the custody arrangement set forth in the judgment be a final judicial custody determination. The agreement into which the parties entered, and which was incorporated into the judgment, does use the term "final settlement," but not clearly and affirmatively with respect to the issues of legal and physical child custody. Specifically, article 2 of the agreement states:

> "The purposes of this Agreement are to effect a complete and *final settlement* with reference to each other of: [¶] (a) All of the respective property rights of the parties. [¶] (b) The obligations of each party for the support of the other and for the minor child of their marriage[and] [¶] (c) All present, past, and future claims of any kind that either may have against the other, except as otherwise provided for herein." (Italics added.)

Furthermore, the judgment indicates on its face that the parties did not intend that it be a final judicial custody determination within the meaning of *Montenegro*, *supra*, 26 Cal.4th 249. Specifically, section 6.01.3 of the agreement provides:

> "The parents *will review* the custodial schedule when the child is *older* and the 2-2-3-3 schedule is *no longer optimal for her*." (Italics added.)

The foregoing language strongly indicates an intent that the stipulated custody arrangement be temporary, not final. " 'The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally. [Citations.]" (*In re Marriage of Richardson, supra,* 102 Cal.App.4th at pp. 948-949.) " ' " 'The entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention.' " ' " (*Id.* at p. 949.) " 'Where an ambiguity exists, the court may examine the entire record' " to determine the scope and effect of the judgment, and it may also " 'refer to the circumstances surrounding the making of the order or judgment.' " (*Ibid.*)

Here, Section 6.01.3 of the parties' agreement, as incorporated into the judgment, expressly provides that the parties "will review" the custody arrangement when Caitlynn is "older" and the initial stipulated arrangement is "no longer optimal for her." The terms "older" and "no longer optimal for her" are vague and undefined. "Older" is vague as to the amount of time that must pass. The term "no longer optimal" grants the parties the right to seek review of the custody arrangement for any number of unspecified reasons.

Because the judgment embodies a stipulated determination the parties "will review" the custodial arrangement, and the judgment permits such review at any time for virtually any reason, we conclude the judgment indicates on its face that the parties intended that the stipulated custody arrangement be temporary, and that the party seeking review need not demonstrate a substantial change of circumstances. Accordingly, we

also conclude the court erred in finding both that the legal and physical custody orders were a final judicial custody determination, and that the substantial change of circumstances standard applied.

Our interpretation of the judgment and the child custody orders incorporated therein finds additional support in Angel-Levy's October 2007 addendum letter, in which she stated that "[b]oth parents did agree that a 2-2-3 schedule is *not suitable for a longer term parenting plan*" (italics added), and "if [Kappeler] continues to be of the belief that a primary home must be chosen for the child, a full custody evaluation would be required because both parents would need to be considered as potential primary custodians." These statements show that the mediator, like the parties, understood that the stipulated custody arrangements, which were later incorporated into the judgment, were temporary.

Because the court erroneously found the stipulated custody provisions constituted a final judicial custody determination and thus erroneously applied the wrong standard in ruling on Kappeler's OSC for modification of the legal and physical custody orders, we reverse the order and remand the matter with directions to the family court to conduct further proceedings on Kappeler's OSC under the best interests of the child standard. Our opinion should not be construed as an indication as to how the court on remand should rule on the merits of Kappeler's OSC.

DISPOSITION

The order is reversed, and the matter is remanded for further proceedings on Kappeler's OSC. Each party to bear own costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.